Michaelmas Term
[2009] UKSC 8
On appeal from: [2008] EWCA Civ 1445

JUDGMENT

R (on the application of A) (FC) (Appellant) *v* London Borough of Croydon (Respondents) and one other action
R (on the application of M) (FC) (Appellant) *v* London Borough of Lambeth (Respondents) and one other action

before

Lord Hope, Deputy President
Lord Scott
Lord Walker
Lady Hale
Lord Neuberger

JUDGMENT GIVEN ON

26 November 2009

Heard on 20, 21, 22 & 23 July 2009

Appellant (A)

John Howell QC
Ian Wise

(Instructed by Harter and Loveless Solicitors)

Respondent (LB of Croydon)
Nigel Giffin QC
Bryan McGuire
Peggy Etiebet
(Instructed by Democratic and Legal Services Division)

Appellant (M)

Timothy Straker QC
Christopher Buttler
(Instructed by Bennett Wilkins Solicitors)

Respondent (LB of Lambeth)
Charles Bear QC
Jon Holbrook
(Instructed by Sternberg Reed)

Intervener (Secretary of State for the Home Department)
Nathalie Lieven QC
Deok Joo Rhee
(Instructed by Treasury Solicitors)

Intervener in writing (Children's Commissioner)

Richard Drabble QC
Ranjiv Khubber

LADY HALE

1. So much depends upon how one frames the question. Put simply, when disputes arise about the age of some-one who is asking a local children's services authority to provide him with accommodation under section 20(1) of the Children Act 1989, who decides whether he is a child or not? Section 20(1) reads as follows:

> "(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of –
>
> (a) there being no person who has parental responsibility for him;
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> (b) his being lost or having been abandoned; or
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> (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care."

By section 105(1) of the Act, a "'child' means . . . a person under the age of eighteen".

2. The appellants, supported by the Children's Commissioner for England, say that, in cases of dispute, the court must decide whether a person is a child on the balance of probabilities. The respondent local authorities, supported by the Home Secretary, say that the authority must decide the matter, subject only to judicial review on the usual principles of fairness and rationality.

The importance of the issue

3. No doubt there have always been foundlings, abandoned or runaway children whose age was not immediately apparent to the authorities. But with many of these it will at least have been apparent that they were children. And sooner or later it will usually have been possible to establish their exact age by discovering their identity and obtaining a birth certificate. The problem of determining age has come to prominence with the recent increase in migration and particularly in unaccompanied young people coming to this country, some of them

to claim asylum for their own benefit but some of them also having been trafficked here for the benefit of others. Although the focus of debate has been upon unaccompanied asylum seeking children, we must not lose sight of the other young people for whom the issue may also be important.

4. The importance comes from two directions. If a young person is a child, and otherwise meets the qualifying criteria, he must be provided with accommodation and maintenance under sections 20(1) and 23(1) of the 1989 Act. This brings with it a wider range of services than other forms of housing and benefit provision. These include the services for young people who leave social services accommodation which were described in *R (M) v Hammersmith and Fulham London Borough Council* [2008] UKHL 14, [2008] 1 WLR 535, paras 20 – 24. While once upon a time young people may have resisted the quasi-parental services provided for children in need, many now recognise that they bring distinct advantages over the housing and welfare benefits available to "home" claimants (as in *R (M) v Hammersmith and Fulham London Borough Council*, above, and *R (G) v Lambeth London Borough Council* [2009] UKHL 26, [2009] 1 WLR 1299) and the National Asylum Support Service ("NASS") support available to asylum seekers, as in the cases before us.

5. The Home Secretary also adopts different policies in relation to asylum seekers who are under eighteen. Legally, these may not be relevant to the issue which we have to determine, and in practice they are much more susceptible to change than is primary legislation such as the 1989 Act. But they are an important part of the factual background. Not only are unaccompanied asylum seeking children looked after by the local children's services authorities rather than by NASS while their claims are decided. Currently, if a claim is rejected when the child is under the age of seventeen and a half, the Home Secretary will not remove him for three years or until he reaches seventeen and a half, whichever is the earlier, unless there are adequate arrangements to look after him in his country of origin. Also, such children will not be detained under the Home Secretary's immigration powers, save in exceptional circumstances and then normally only overnight.

6. When a young person who says that he is a child arrives in this country or makes a claim for asylum, immigration officers make a preliminary determination based upon his physical appearance and demeanour. In a borderline case, the policy is to give him the benefit of the doubt and treat him as a child. Under the Secretary of State's 2007 Policy on Age Dispute cases, if his appearance or demeanour "very strongly" suggests that he is aged eighteen or over, the officer will dispute the age unless there is credible documentary or other evidence to show the age claimed. And if his appearance or demeanour "very strongly" suggest that he is "significantly" over eighteen then he will be treated as an adult. In the

middle, age disputed, category, it is the policy to refer the case for assessment by the local social services authority and to accept that assessment if it is considered to have been properly carried out (in accordance with the procedural guidance given by Stanley Burnton J in *R (B) v Merton London Borough Council* [2003] EWHC 1689 (Admin), [2003] 4 All ER 280).

7. This was the policy adopted by the Home Secretary in August 2007. But in February 2007 the Home Office published a consultation paper, *Planning Better Outcomes and Support for Unaccompanied Asylum Seeking Children*; and in January 2008, it published its conclusions and recommendations in *Better Outcomes: The Way Forward, Improving the Care of Unaccompanied Asylum Seeking Children*. Key Reform Number 4 was to put in place better procedures to assess age, in order to ensure that children and adults are not accommodated together. Both the Children's Commissioner and the Refugee Council have been critical of the present procedures, based partly upon their own experience and observations and partly upon research conducted by Professor Heaven Crawley for the Immigration Law Practitioners' Association.

8. As Ms Nathalie Lieven QC for the Home Secretary points out, the issue before us is not whether the policy and procedures for assessing age in these cases could be improved, but whether the law requires that, in cases which cannot be resolved through those processes, the court shall make the final determination. However, the one thing which these proposals do show is that the assessment of age can be and is carried out quite separately from the assessment of need and the other criteria for accommodation under section 20.

These two cases

9. A arrived in this country from Afghanistan on 13 November 2007 and claimed asylum the following day, stating that his date of birth was 8 April 1992 (making him then fifteen and a half). The immigration officer considered that he was eighteen and referred him to Croydon for an age assessment. He was interviewed by two social workers who assessed him as an adult. He was therefore referred to NASS. Soon afterwards his solicitors produced a copy of a birth certificate from Afghanistan showing his date of birth as 8 April 1992. They also arranged for him to be examined by a paediatrician, who reported that in her opinion he was aged between 15 and 17. A claim for judicial review of the decision that he was not entitled to accommodation under section 20 of the 1989 Act was made on 7 March 2008 and an interim order made against the authority until the determination of the claim.

10. M arrived in this country in November 2006 and claimed asylum three days later, saying that he was born on 15 December 1989 (making him then just under seventeen). His age was disputed and he was referred to Lambeth for an age assessment by two social workers who concluded that he was over eighteen. Once again, a paediatrician's report was obtained which concluded that he was indeed aged seventeen. Judicial review proceedings were brought and Lambeth reviewed its decision but provided further reasons for concluding that M was more than twenty years old. Meanwhile an immigration judge heard his appeal against the refusal of asylum and the Home Secretary's decision as to his age. The judge was not referred to the local authority's assessment and accepted the paediatrician's report. The Home Secretary therefore granted M discretionary leave to remain which has been extended pending the determination of his application for an extension of his leave.

11. These two and five other claims for judicial review were joined for the purpose of deciding a number of preliminary issues, with these two being treated as the lead cases. Those issues were (a) whether the local authorities' determinations were contrary to the procedural protections in article 6 and/or 8 of the European Convention on Human Rights; (b) whether the question of "child or not" for the purpose of section 20 of the 1989 Act was one of precedent fact for the court to determine on the balance of probabilities; and (c) whether in M's case the local authority could disagree with the immigration judge's decision.

12. On 20 June 2008, Bennett J decided all three issues in favour of the local authorities: [2008] EWHC 1364 (Admin). He also declined to decide a fourth issue, as to the evidential value of paediatricians' reports in age disputes. That issue has since been determined by Collins J in *R (A) v Croydon London Borough Council; R (WK) v Kent County Council* [2009] EWHC 939 (Admin), the Kent case taking the place of the Lambeth case as lead case in this issue. Collins J held that the paediatricians' views should be taken into account but that they were not likely to be any more reliable or helpful than those of experienced social workers and the authorities were entitled to prefer the latter. He was, of course, bound by the decision of the Court of Appeal as to the role of the courts in these cases.

13. On 18 December 2008, the Court of Appeal had dismissed the appellants' appeals from the decisions of Bennett J on the preliminary issues of law: [2008] EWCA Civ 1445, [2009] PTSR 1011. The issues have been slightly reformulated for the purpose of the appeals before us, but the first two are closely inter-related:

> (i) whether, as a matter of statutory construction, the duty imposed by section 20(1) is owed only to a person who appears to the local authority to be a child, so that the authority's decision can only be

challenged on "Wednesbury" principles, or whether it is owed to any person who is in fact a child, so that the court may determine the issue on the balance of probabilities;

(ii) whether the issue "child or not" is a question of "precedent" or "jurisdictional" fact to be decided by a court on the balance of probabilities; and

(iii) whether section 20(1) gives rise to a "civil right" for the purpose of article 6(1) of the European Convention on Human Rights and if so whether the determination of age by social workers subject to judicial review on "Wednesbury" principles is sufficient to comply with the requirement that the matter be determined by a fair hearing before an independent and impartial tribunal.

The construction of section 20(1)

14. The argument on construction, advanced by Mr John Howell QC for A, is quite straightforward. The words of section 20(1) themselves distinguish between the statement of objective fact – "any child in need within their area" – and the descriptive judgment – "who appears to them to require accommodation as a result of" the three listed circumstances – which is clearly left to the local authority. The definition of "child" in section 105(1), which applies throughout the 1989 Act, is unqualified: "a person under the age of eighteen" – not "a person who appears to the local authority to be under the age of eighteen" or "a person whom the local authority or any other person making the initial decision reasonably believes to be under the age of eighteen". Reaching the conclusion that this is what it means in section 20(1) requires, as the Court of Appeal accepted, words to be read into section 20 which are not there.

15. This argument is bolstered by two others. One is derived from the legislative history. Section 20(1) of the 1989 Act is the successor to section 2 of the Child Care Act 1980 which consolidated (without amendment) what had been section 1 of the Children Act 1948 with later legislation. The 1948 Act was an important component of the establishment of the post-war welfare state, bringing together all the disparate powers and duties of the state to look after children who had no families or whose families were unable to look after them properly, and infusing those new duties with a commitment to the welfare of the individual child which had been so lacking before (see *Report of the Care of Children Committee*, Chairman: Miss Myra Curtis, 1946, Cmd 6922).

16. Section 1(1) of the 1948 Act, reproduced in section 2(1) of the 1980 Act, began "Where it appears to a local authority with respect to a child in their area appearing to them to be under the age of seventeen . . .". Section 20(1) of the 1989 Act made various changes. These included raising the age of eligibility to cater for all children, not just those who appeared to be under seventeen. But they also included the change in wording, which no longer limited the duty to those who appeared to the local authority to be under the relevant age. There is nothing in the *Review of Child Care Law: Report to Ministers of an Interdepartmental Working Party* (DHSS, 1985) or in the white paper, *The Law on Child Care and Family Services* (1987, Cm 62), which preceded the 1989 Act to cast light on the reasons for the change in wording. But when Parliamentary draftsmen make changes such as this they are normally presumed to have done so deliberately and not by mistake.

17. The second point is that the same definition of "child" applies throughout the 1989 Act. The 1989 Act contains a variety of powers and duties relating to children, some of them voluntary, but many of them coercive as against the child or his parents. Most of the coercive powers, to make orders relating to the care and upbringing of children, depend upon court orders. Clearly, in those cases it is for the court to determine any disputes about the age of the child. But there are some coercive powers which are operated in the first instance by other authorities, subject to bringing the case to court within a relatively short time.

18. One of these is the power of the police, in section 46, "where a constable has reasonable cause to believe that a child would otherwise be likely to suffer significant harm" to remove a child to suitable accommodation and keep him there. This power is not infrequently used to pick up young people who are camping out in railway stations with no apparent place to go. If someone who was not a child was removed in this way, he could apply immediately for habeas corpus and the court would have to inquire into whether or not he was indeed a child. The section does not refer to a "person whom the constable has reasonable cause to believe to be a child" and where liberty is at stake the court would be slow to read it in that way.

19. A similar case is perhaps more telling for our purposes because it is contained in section 25, which, like section 20, appears in Part III of the 1989 Act, entitled "Local Authority Support for Children and Families". Section 25, and the regulations made under it, place limits on the circumstances in which "a child who is being looked after by a local authority" may be placed in "accommodation provided for the purpose of restricting liberty". A child who is being "looked after" by a local authority means any child who is subject to a care order or a child who is provided with accommodation by a local authority under their social services functions, which include section 20(1) (see 1989 Act, section 22(1)). The

regulations allow a child to be placed in secure accommodation – that is, to be locked up – for up to 72 hours without the authority of a court (Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg 10(1)). Again, if a person who was not a child was locked up in this way, he could apply for habeas corpus and the court would have to enquire into whether or not he was a child. There is nothing to suggest that the power can be exercised in relation to someone whom the authority reasonably believes to be a child.

20. Against these arguments, the respondents make three main points. The first is that section 20(1) refers to a "child in need". Section 105(7) provides that references to a child in need shall be construed in accordance with section 17. Section 17(10) provides that:

> "For the purposes of this Part a child shall be taken to be in need if –
>
> (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;
>
> (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
>
> (c) he is disabled, . . . "

Thus, argues Mr Charles Béar QC for Lambeth, it cannot have been the intention of Parliament that the sorts of professional value judgment involved in assessing whether a child is "in need" should be made by the court. "Child in need" is a composite term of art so that the same should apply to the assessment of age as well as need.

21. This argument is closely allied to a second and more fundamental argument about the respective roles of public authorities and the courts when determining whether the conditions exist for the exercise of a statutory power or duty. The court decides what the words mean and the authority decides whether the facts fit those words. Thus, in the well-known case of *R v Barnet London Borough Council, Ex p Shah* [1983] 2 AC 309, the court decided what was meant by "ordinarily resident" in the criteria for entitlement to a mandatory education grant

and sent the case back to the local authority to decide. Lord Scarman said this, at p 341:

> "If a local education authority gets the law right, or, as the lawyers would put it, directs itself correctly in law, the question of fact – ie has the student established the prescribed residence? – is for the authority, not the court, to decide. The merits of the application are for the local education authority subject only to judicial review to ensure that the authority has proceeded according to the law."

22. To similar effect were the observations of Lord Brightman in *R v Hillingdon London Borough Council, Ex p Puhlhofer* [1986] AC 484, where the court decided whether the Housing (Homeless Persons) Act 1977 imported any requirement that the accommodation currently occupied by a household claiming to be homeless be accommodation which it was reasonable for them to continue to occupy. Having decided that it did not, Lord Brightman insisted, at p 517, that "What is properly to be regarded as accommodation is a question of fact to be decided by the local authority".

23. Third in the line of cases cited on this point were my own words in *R (Wahid) v Tower Hamlets London Borough Council* [2002] LGR 545, 554, which are particularly pertinent because they relate to the duty of local social services authorities, under section 21(1)(a) of the National Assistance Act 1948, to provide residential accommodation for vulnerable adults who meet the criteria there laid down: "it is for the local social services authority to assess whether or not those conditions are fulfilled, and if so, how the need is to be met, subject to the scrutiny of the courts on the ordinary principles of judicial review".

24. We are not deciding where the lines of responsibility are to be drawn under the National Assistance Act 1948. We are deciding where Parliament intended that the lines be drawn under the Children Act 1989. The task in all these cases is to decide what Parliament intended. In the *Shah* case, it was common ground between the parties on all sides that it was for the local education authority to decide the facts. No-one mounted an argument such as has been mounted in this case. We do not need to decide how it would have fared in 1983, any more than we need to speculate upon how it might be decided now. In the *Puhlhofer* case, the statutory duty to provide accommodation for the homeless was clearly expressed in terms that the local authority was satisfied that the criteria existed, as indeed is its successor today. Lord Brightman emphasised, at p 518, that the 1977 Act "abounds with the formula when, or if, the housing authority are satisfied as to this, or that, or have reason to believe this, or that" in support of his conclusion that "Parliament intended the local authority to be the judge of fact".

25. That is not the case with the National Assistance Act 1948, which has gone through several modifications since it was first enacted, when the duty of the local authority was to prepare a scheme for accommodating the vulnerable which had then to be approved by the minister. It is not impossible that Parliament did not contemplate that such a duty would be owed to any particular individual, whereas this House has clearly held, in *R (G) v Barnet London Borough Council* [2003] UKHL 57, [2004] 2 AC 208, that the duty in section 20(1) of the 1989 Act is owed to the individual child.

26. These days, Parliamentary draftsmen are more alive to this kind of debate. The 1989 Act draws a clear and sensible distinction between different kinds of question. The question whether a child is "in need" requires a number of different value judgments. What would be a reasonable standard of health or development for this particular child? How likely is he to achieve it? What services might bring that standard up to a reasonable level? What amounts to a significant impairment of health or development? How likely is that? What services might avoid it? Questions like this are sometimes decided by the courts in the course of care or other proceedings under the Act. Courts are quite used to deciding them upon the evidence for the purpose of deciding what order, if any, to make. But where the issue is not, what order should the court make, but what service should the local authority provide, it is entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the public authority, subject to the control of the courts on the ordinary principles of judicial review. Within the limits of fair process and "Wednesbury reasonableness" there are no clear cut right or wrong answers.

27. But the question whether a person is a "child" is a different kind of question. There is a right or a wrong answer. It may be difficult to determine what that answer is. The decision-makers may have to do their best on the basis of less than perfect or conclusive evidence. But that is true of many questions of fact which regularly come before the courts. That does not prevent them from being questions for the courts rather than for other kinds of decision makers.

28. The arguments advanced by Mr Béar might have to provide an answer in cases where Parliament has not made its intentions plain. But in this case it appears to me that Parliament has done just that. In section 20(1) a clear distinction is drawn between the question whether there is a "child in need within their area" and the question whether it appears to the local authority that the child requires accommodation for one of the listed reasons. In section 17(10) a clear distinction is drawn between whether the person is a "child" and whether that child is to be "taken to be" in need within the meaning of the Act. "Taken to be" imports an

element of judgment, even an element of deeming in the case of a disabled child, which Parliament may well have intended to be left to the local authority rather than the courts.

29. I reach those conclusions on the wording of the 1989 Act and without recourse to the additional argument, advanced by Mr Timothy Straker QC for M, that "child" is a question of jurisdictional or precedent fact of which the ultimate arbiters are the courts rather than the public authorities involved. This doctrine does, as Ward LJ pointed out in the Court of Appeal [2008] EWCA Civ 1445, [2009] PTSR 1011, para 19, have "an ancient and respectable pedigree". Historically, like the remedy of certiorari itself, it was applied to inferior courts and other judicial or quasi-judicial bodies with limited jurisdiction. Thus a tithe commissioner could not give himself jurisdiction over land which had previously been discharged from tithe (*Bunbury v Fuller* (1853) 9 Ex 111); and a rent tribunal could not give itself jurisdiction over an unfurnished letting (*R v Fulham, Hammersmith and Kensington Rent Tribunal, Ex p Zerek* [1951] 2 KB 1). Although of course such a body would have to inquire into the facts in order to decide whether or not to take the case, if it got the decision wrong, it could not give itself a jurisdiction which it did not have.

30. In *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74, the same principle was applied to the power of the Home Office to remove an "illegal entrant". The existence of the power of removal depended upon that fact. It was not enough that an immigration officer had reasonable grounds for believing the person to be an illegal entrant. As Lord Scarman put it, ". . . where the exercise of executive power depends upon the precedent establishment of an objective fact, the courts will decide whether the requirement has been satisfied" (p 110).

31. This doctrine is not of recent origin or limited to powers relating to the liberty of the subject. But of course it still requires us to decide which questions are to be regarded as setting the limits to the jurisdiction of the public authority and which questions simply relate to the exercise of that jurisdiction. This too must be a question of statutory construction, although Wade and Forsyth on *Administrative Law* suggest that "As a general rule, limiting conditions stated in objective terms will be treated as jurisdictional" (9th ed (2004), p 257). It was for this reason that Ward LJ rejected the argument, for he regarded the threshold question in section 20 as the composite one of whether the person was a "child in need". This was not a limiting condition stated in wholly objective terms so as to satisfy the Wade and Forsyth test (para 25).

32. However, as already explained, the Act does draw a distinction between a "child" and a "child in need" and even does so in terms which suggest that they are two different kinds of question. The word "child" is undoubtedly defined in wholly objective terms (however hard it may be to decide upon the facts of the particular case). With a few limited extensions, it defines the outer boundaries of the jurisdiction of both courts and local authorities under the 1989 Act. This is an Act for and about children. If ever there were a jurisdictional fact, it might be thought, this is it.

33. The final arguments raised against such a conclusion are of a practical kind. The only remedy available is judicial review and this is not well suited to the determination of disputed questions of fact. This is true but it can be so adapted if the need arises: see *R (Wilkinson) v Broadmoor Special Hospital Authority* [2001] EWCA Civ 1545, [2002] 1 WLR 419. That the remedy is judicial review does not dictate the issue for the court to decide or the way in which it should do so, as the cases on jurisdictional fact illustrate. Clearly, as those cases also illustrate, the public authority, whether the children's services authority or the UK Border Agency, has to make its own determination in the first instance and it is only if this remains disputed that the court may have to intervene. But the better the quality of the initial decision-making, the less likely it is that the court will come to any different decision upon the evidence. If the other members of the Court agree with my approach to the determination of age, it does not mean that all the other judgments involved in the decision whether or not to provide services to children or to other client groups must be subject to determination by the courts. They remain governed by conventional principles.

Article 6

34. Those conclusions make it unnecessary to reach any firm conclusions on the application of article 6 of the Convention to decisions under section 20(1) of the 1989 Act. Article 6(1) requires that "in the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." There are two questions. First, is the decision whether or not to provide accommodation under section 20(1) the determination of a "civil right", so that article 6 is engaged? Secondly, if it is, what does article 6 require? Neither question is easy to answer.

35. First, it seems to me clear that, once the qualifying criteria are established, the local authority has no discretion under section 20(1): the accommodation must be provided. The existence of the criteria is a matter of judgment, not discretion. Thus it makes sense to talk in terms of a correlative right to the accommodation,

rather than simply a right to apply for it. But that does not tell us whether it is a "civil right" for the purpose of article 6.

36. As Lord Hoffmann explained in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, para 78 et seq, the concept of a "civil right" in article 6 was originally intended to apply only to private rights, not rights arising in public law. But that distinction has long been abandoned and the concept of the determination of a civil right extended to many questions arising in public law. With that extension has gone some modification of what article 6 requires.

37. Mr Nigel Giffin QC, appearing for Croydon, has helpfully divided the Strasbourg cases into two categories. In the first are those cases where the determination of a public law question is also decisive of the existence of private law rights. The obvious examples are *Ringeisen v Austria (No 1)* (1971) 1 EHRR 455, in which a contract for the sale of land between private citizens required the approval of the public authority; and *Obermeier v Austria* (1990) 13 EHRR 290, in which the dismissal of a disabled person by a private authority required the consent of a public authority; but the cases concerning the licensing of a trade or profession, such as *Benthem v The Netherlands* (1985) 8 EHRR 1, *Albert and Le Compte v Belgium* (1983) 5 EHRR 533, and *Kingsley v United Kingdom* (2002) 35 EHRR 177, directly affecting private contractual relationships, also fall into this category.

38. The second category, however, is more difficult to define. Mr Giffin suggests that it consists of rights in public law which are closely analogous to rights in private law. These began with rights to contributory state benefits, which are clearly analogous to rights under private contracts of insurance (*Feldbrugge v The Netherlands* (1986) 8 EHRR 425). They have now been extended to rights to non-contributory state benefits, which have also been recognised as rights of property for the purpose of article 1 of the First Protocol *(Salesi v Italy* (1993) 26 EHRR 187; *Mennitto v Italy* (2000) 34 EHRR 1122; *Mihailov v Bulgaria*, app no 52367/99, judgment of 21 July 2005) and to the distribution of compensation for forced labour during the second world war (*Wos v Poland* (2006) 45 EHRR 659). They have also extended to some types of public sector employment, despite the clear reluctance of many European countries (including the United Kingdom) to regard public sector employment in the same light as private sector employment (*Vilho Eskelinen v Finland* (2007) 45 EHRR 985). But there remain limits: taxation proceedings do not raise issues of civil rights, despite their obvious impact upon individual property rights (*Ferrazzini v Italy* (2001) 34 EHRR 1068); nor do immigration decisions (*P v United Kingdom* (1987) 54 DR 211); or decisions about state subsidies to housing associations (*Woonbron Volkshuisvestingsgroep v The Netherlands*, app no 47122/99, admissibility decision of 18 June 2002).

39. So does a claim to be provided with welfare services by the state amount to a civil right for this purpose? The House of Lords, in *R (Runa Begum) v Tower Hamlets London Borough Council (First Secretary of State intervening)* [2003] UKHL 5, [2003] 2 AC 430, was content to assume, without deciding, that a claim to be provided with suitable accommodation under the homelessness provisions of Part VII of the Housing Act 1996 was such a right. But no Strasbourg case had yet gone so far. Mr Howell argues that the court has now done so; a number of cases from Russia, about delays in enforcing court judgments that an applicant was entitled to be provided with a flat of a certain size, have taken it for granted that this was a civil right (see eg *Teteriny v Russia*, app no 11931/03, judgment of 30 June 2005; *Sypchenko v Russia*, app no 38368/04, judgment of 1 March 2007). Enforcement only comes within article 6 because it is an intrinsic part of the trial. Thus, he argues, the underlying right to which the judgment relates must be a civil right. There is no requirement in the Strasbourg case law that the right be analogous with a right existing in private law, for the non-contributory state benefits have no such equivalent. All that is required is that the right is economic in nature and personal to the individual. This he gets from, for example, *Salesi v Italy*, above, where the court said, of a claimant to non-contributory disability allowance, "she suffered an interference with her means of subsistence and was claiming an individual, economic right flowing from specific rules laid down in a statute" (para 19). It does not have to be tradable and, he argues, like many ordinary private rights, it may well depend upon evaluative judgments rather than specific rules.

40. On the other hand, it does not appear that there was any argument upon the point in the Russian cases and it is easy to slip into the assumption that once a right has been crystallised in a court judgment against a public authority it must amount to a civil right. In *Loiseau v France*, app no 46809/99, admissibility decision of 18 November 2003, which concerned a freedom of information request for sight of the applicant teacher's personnel file, the court considered this a right of a private nature, firstly because "it concerns an individual right of which the applicant may consider himself the holder", and secondly because the documents requested "related directly and exclusively to his personal situation" (para 7). Any entitlement under section 20(1) does not depend upon discretion, but it does depend upon an evaluation of some very "soft" criteria rather than specific rules, and it is difficult to say at what point the applicant may consider himself to be the holder of such a right. Hence, as Lord Walker of Gestingthorpe observed in *Runa Begum*, at para 115, if a right such as this is a "civil right" at all, it must lie close to the boundary of the concept and not at the core of what it entails. If so, this may have consequences for the second question, which is what article 6 requires.

41. In *Runa Begum*, the House decided that the process of decision-making on homelessness claims was sufficient to comply with article 6 if it applied at all. The initial decision was subject to review by another officer who had had nothing to do

with the original decision and was subject to procedural rules designed to ensure a fair process. It was then subject to an appeal to the county court on conventional judicial review grounds. The reviewing officer was not independent of the local authority but she was impartial. If she did not conduct her review in an impartial way, the court could correct this.

42. In *Tsfayo v United Kingdom* (2006) 48 EHRR 457, the Strasbourg court quoted extensively from both *Alconbury* and *Runa Begum* without expressing either approval or disapproval. It drew three distinctions between those cases and the determination of a claim for housing benefit by the local authority's housing benefit review board. First, the decision on the housing benefit claim was a simply question of whether or not the claimant had good cause for a late claim; it was not an issue requiring professional judgment as the decision on homelessness in *Runa Begum* had been. Second, it was a question of entitlement, not depending upon the application of government policy which was properly the province of the democratically accountable bodies, as the decision on the application of planning policy in *Alconbury* had been. Third, the review board was not merely lacking in independence. It could not be an impartial tribunal because it consisted of councillors who were directly connected to the authority which would have to pay the benefit if it was awarded.

43. Mr Howell argues that the social workers deciding upon section 20 claims cannot be "impartial" as required by article 6 because they are employed by an authority with a direct financial interest in the outcome. Although their individual professionalism is not in doubt, they may unconsciously be influenced by tacit pressures from their seniors, who are only too conscious of the many demands upon the children's services' scarce resources. These are not necessarily fully compensated by payments from the UK Border Agency. In any event it is not actual bias which matters, for that can hardly ever be proved, but the "public perception of the possibility of unconscious bias" (in the words of Lord Steyn in *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2003] ICR 856, at para 14). Although judicial review may be able to cure actual bias, which leads the decision-maker to take irrelevant considerations into account or disregard the relevant ones, it cannot cure apparent unconscious bias of this kind.

44. I would be most reluctant to accept, unless driven by Strasbourg authority to do so, that article 6 requires the judicialisation of claims to welfare services of this kind. Unlike the arguments based upon statutory construction and jurisdictional fact, Mr Howell's argument cannot sensibly distinguish between the determination of age and the determination of the other criteria of entitlement. Every decision about the provision of welfare services has resource implications for the public authority providing the service. Public authorities exist to serve the public. They do so by raising and spending public money. If the officers making

the decisions cannot be regarded as impartial, and the problem cannot be cured by the ordinary processes of judicial review based upon the usual criteria of legality, fairness and reasonableness or rationality, then tribunals will have to be set up to determine the merits of claims to children's services, adult social services, education services and many more. Resources which might be spent on the services themselves will be diverted to the decision-making process. Such a conclusion would be difficult, if not impossible, to reconcile with the decision of this House in *Runa Begum*. The degree of judicialisation required of an administrative decision, in the view of Lord Hoffmann in *Alconbury*, depends upon the "nature of the decision" (para 87, repeated in *Runa Begum*, para 33).

45. If this is a civil right at all, therefore, I would be inclined to hold that it rests at the periphery of such rights and that the present decision-making processes, coupled with judicial review on conventional grounds, are adequate to result in a fair determination within the meaning of article 6.

Conclusion

46. For the reasons given earlier, however, I would allow these appeals and set aside the order of the Court of Appeal. The result is that if live issues remain about the age of a person seeking accommodation under section 20(1) of the 1989 Act, then the court will have to determine where the truth lies on the evidence available. It is not, however, entirely clear what relief the appellants now seek and so I would invite submissions upon this, and upon the question of costs, within fourteen days.

LORD HOPE

47. This case raises two distinct issues of general public importance. Their importance extends well beyond the facts of the two cases that are before us. On the one hand there is the question whether the word "child" in section 20(1) of the Children Act 1989 means, as the Court of Appeal held, a person whom the local authority has reasonable grounds for believing to be a child: [2008] EWCA Civ 1445; [2009] PTSR 1011, paras 30-31; or whether it raises a question of precedent fact which must be determined, if necessary, by a court. On the other there is the question whether a decision that the local authority makes as to whether or not to provide accommodation for a child in need under section 20(1) is a determination of a "civil right" within the meaning of article 6(1) of the European Convention on Human Rights.

48. As to the first issue, it has wider implications because the appellants are both asylum seekers. The immediate question is how it is to be determined whether the appellants are under the age of eighteen and thus entitled to be considered for local authority support under Part III of the Children Act 1989. But, as the Secretary of State points out, an asylum seeker's age will have implications too for the way in which his or her application for asylum will be treated. This is because the Secretary of State's policy on returning unaccompanied minors usually leads to those whom he considers to be under the age of 18 being given discretionary leave to remain. Age, as such, is not a determinant as to a person's immigration status. But it is relevant to the way the Secretary of State discharges his immigration and asylum functions and the exercise of his powers and duties to provide asylum support. In practice, in disputed age cases, the Secretary of State follows the assessment that has been arrived at by the local authority. As a result any challenges to the lawfulness of the local authority's assessment are likely to affect the way that the Secretary of State acts in reliance on the assessment. His concern is that the appellant A's contention that the question whether or not a person is a child is, in the event of challenge, to be determined by a court will result in an inappropriate judicialisation of the process. The suggestion is that this will slow down the process and make it harder to administer.

49. As to the second, a holding that the local authority's decision as to whether or not to provide accommodation under section 20(1) of the 1989 Act amounted to the determination of a "civil right" would have far reaching implications. This because the right which is guaranteed by article 6(1) is to a decision by "an independent and impartial tribunal established by law." As the House recognised in *Runa Begum v Tower Hamlets London Borough Council (First Secretary of State intervening)* [2003] UKHL 5, [2003] 2 AC 430, it cannot plausibly be argued that the employees of the local authority who take decisions of this kind on its behalf are independent of the authority: see Lord Bingham of Cornhill, para 3, and Lord Hoffmann, para 27. The question then is what must be done if the article's requirements are to be satisfied. In *Runa Begum* the House held that the county court's appellate jurisdiction under section 204 of the Housing Act 1996, exercising the normal judicial review jurisdiction of the High Court, was sufficient to satisfy the requirements of the article. But, although the housing officer in that case could not be regarded as independent, no question was raised as to her impartiality. In this case the impartiality of the social workers is challenged. This in turn raises questions as to the intensity of any judicial review that must be undertaken if the requirements of article 6(1) are to be satisfied. This will have implications as to the way decisions are taken in the provision of a wide range of public services.

50. The facts of these appeals and the general background to the issues they raise have been summarised by Lady Hale. I accept her valuable description of them with gratitude. I wish to add only a few words on the first issue, as I am in

full agreement with what she says. As for the second, I agree with her that it follows from our decision on the first issue that it is unnecessary to reach any firm conclusions on it. But I think that it is reasonably clear from the present state of the authorities how it should be answered. In view of its general importance I should like to explain the answer that I would give to it.

The section 20(1) issue

51. It seems to me that the question whether or not a person is a child for the purposes of section 20 of the 1989 Act is a question of fact which must ultimately be decided by the court. There is no denying the difficulties that the social worker is likely to face in carrying out an assessment of the question whether an unaccompanied asylum seeker is or is not under the age of 18. Reliable documentary evidence is almost always lacking in such cases. So the process has to be one of assessment. This involves the application of judgment on a variety of factors, as Stanley Burnton J recognised in *R (B) v Merton London Borough Council* [2003] EWHC Admin 1689, [2003] 4 All ER 280, para 37. But the question is not whether the person can properly be described as a child. Section 105(1) of the Act provides:

> "In this Act –
>
> …
>
> "child" means, subject to paragraph 16 of Schedule 1, a person under the age of eighteen."

The question is whether the person is, or is not, under the age of eighteen. However difficult it may be to resolve the issue, it admits of only one answer. As it is a question of fact, ultimately this must be a matter for the court.

52. In the Court of Appeal and in the argument before us, reference was made to the rule that where the exercise of executive power depends upon the precedent establishment of an objective fact, the courts will, if called upon to do so in a case of dispute, decide whether the requirement has been satisfied: *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74, 110, per Lord Scarman. On the other hand, as Sir Thomas Bingham MR observed in *R v Secretary of State for the Home Department, ex p Onibiyo* [1996] QB 768, 785, where the question is one that is to be determined by the executive itself, its determinations will be susceptible to challenge only on *Wednesbury* principles: *R v Secretary of State for the Home Department, Ex p Bugdaycay* [1987] AC 514. In

order to decide into which class of judgment the case falls one must, of course, first construe the statutory language used and the scheme of the legislation.

53. If, as the respondents contend, and Ward LJ in the Court of Appeal, para 25, accepted, the phrase "child in need" which sets the threshold for the provision of accommodation under section 20 must be taken as a whole, the judgment that must be made will fall into the latter category. But the definition of "child" in section 105(1) applies to the Act as a whole, without qualification or exception. The question whether the child is "in need" is for the social worker to determine. But the question whether the person is or is not a child depends entirely upon the person's age, which is an objective fact. The scheme of the Act shows that it was not Parliament's intention to leave this matter to the judgment of the local authority.

54. As for the practical consequences, the process begins with the carrying out of an assessment of the person's age by the social worker. Resort to the court will only be necessary in the event of a challenge to that assessment. So I do not accept that our conclusion will inevitably result in an inappropriate judicialisation of the process. It may, of course, require a judicial decision in some cases. But I would hope that the fact that the final decision rests with the court will assist in reducing the number of challenges. The initial decision taker must appreciate that no margin of discretion is enjoyed by the local authority on this issue. But the issue is not to be determined by a consideration of issues of policy or by a view as to whether resort to a decision by the court in such cases is inappropriate. It depends entirely on the meaning of the statute. We must construe the Act as we find it. As I have said, when the subsection is properly construed in the light of what section 105(1) provides, the question admits of only one answer.

The article 6(1) issue

55. Much of the background to the questions which this issue raises was explored in *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430. With that advantage we can examine the issue from the point where that decision left it. On the other hand I would be very reluctant to take anything away from the carefully balanced conclusion that the House reached in that case unless driven to do so by subsequent guidance from Strasbourg. As Lord Bingham explained in para 5, that case exposed more clearly than any earlier case had done the interrelation between the article 6(1) concept of "civil rights" on the one hand and the article 6(1) requirement of "an independent and impartial tribunal" on the other. The narrower the interpretation that is given to "civil rights", the greater the need to insist on review by a judicial tribunal exercising full powers. Conversely, the more elastic the interpretation that is given to the expression, the more flexible

must be the approach to the requirement if over-judicialisation of welfare schemes is to be avoided. What the House did in that case was to assume, without deciding, that Runa Begum's domestic right was also a "civil right" and, having made that assumption, to hold that the absence of a full fact-finding jurisdiction in the tribunal from which an appeal lay from the administrative decision-making body did not disqualify the tribunal for the purposes of article 6(1): Lord Bingham, paras 6, 11; Lord Hoffmann, paras 58, 70.

56. In this case, having held that it was for the social workers to decide the age of the applicant, the Court of Appeal held that judicial review of their decision was sufficient to satisfy the requirements of article 6(1): [2008] EWCA Civ 1445, [2009] PTSR 1011, para 84. Although he recognised that, having reached that view, it was not necessary for him to do so, Ward LJ went further and held that the right of accommodation given by section 20(1) was a right but that it could not be classified as a "civil right" within the meaning of article 6(1) because too much discretion was given to the local authority to decide what kind of accommodation is to be provided: para 59. Maurice Kay LJ and Sir John Chadwick expressed some hesitation as to whether this was a right at all: paras 92, 93. The effect of our decision that the question whether the applicant is or is not under eighteen is an objective fact which must ultimately be one for the court is that the issue will, in the event of a dispute, be decided by an independent and impartial tribunal with powers which fully satisfy the requirements of article 6(1). The question whether the applicant is a child "in need" must then be for the social worker to deal with. But it is very hard to see how an unaccompanied child who is an asylum seeker could be otherwise than in need. This is not an issue that has been raised in these appeals.

57. In this situation it is open to us to regard the article 6(1) issue as academic and to say no more about it. But the questions were fully and carefully argued before us, and they are of general public importance. We are as well informed about the present state of the jurisprudence of the Strasbourg court as we can be. With that advantage, I would venture these observations.

58. The most significant development since the decision in the *Runa Begum* case is the decision of the Strasbourg court in *Tsfayo v United Kingdom* (2006) 48 EHRR 457. The applicant in that case had failed to renew her application for housing and council tax benefit. After taking advice she submitted a prospective claim and a backdated claim for both types of benefit. The council accepted the prospective claim but rejected the backdated one on the ground that the applicant had failed to show good cause why she had not claimed these benefits earlier. The council's housing benefit and council tax benefit review board rejected her appeal against this decision. Her complaint was that the board was not an independent and impartial tribunal, contrary to article 6(1). The court held that disputes about

entitlement to social security and welfare benefits generally fell within the scope of article 6(1). It agreed with the parties that the applicant's claim concerned the determination of her civil rights, that article 6(1) applied and that she had a right to a fair hearing before an independent and impartial tribunal: para 40. It held that the requirements of article 6(1) had been violated. The board, which included five councillors from the local authority which would be required to pay the benefit, lacked independence and the safeguards built into its procedure were not adequate to overcome this fundamental lack of objectivity. The review board had power to quash the council's decision. But it did not have jurisdiction to rehear the evidence or substitute its own views as to the applicant's credibility: paras 47, 48.

59. The question whether the claim concerned the determination of the applicant's civil rights was not disputed. This was not surprising, as the case fell within the mainstream of cases where the issue was one as to the entitlement to an amount of benefit that was not in the discretion of the public authority. This is shown by the cases referred to in a footnote to para 40: *Salesi v Italy* (1993) 26 EHRR 187, para 19; *Schuler-Zgraggen v Switzerland* (1993) 16 EHRR 405, para 46; *Mennitto v Italy* (2000) 34 EHRR 1122, para 28. As Lord Walker of Gestingthorpe said in *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430, para 112, these cases, which started with *Feldbrugge v The Netherlands* (1986) 8 EHRR 425, indicate that article 6(1) is likely to be engaged when the applicant has public law rights which are of a personal and economic nature and do not involve any large measure of official discretion. As the court put in *Salesi v Italy*, para 19, the applicant was claiming an individual, economic right flowing from specific rules laid down in a statute. In *Mennitto v Italy*, para 23, the court said that the outcome of the proceedings must be directly decisive for the right in question.

60. In *Tsfayo v United Kingdom* the court directed its attention to the decision-making process. It quoted, with approval, Lord Bingham's description of the interrelation between the article 6(1) concept of "civil rights" and the requirement for an "independent and impartial tribunal": para 31. The case was decided against the United Kingdom because, in contrast to *Runa Begum* and *Bryan v United Kingdom* (1995) 21 EHRR 342 where the issues to be decided required a measure of professional knowledge or experience and the exercise of discretion pursuant to wider policy aims, the review board in Ms Tsfayo's case was deciding a simple question of fact, namely whether there was good cause for her delay in making the claim. So far as it goes, this decision supports the view that in cases which concern the provision of welfare services of the nature at issue in these appeals judicial review of the kind contemplated in *Runa Begum* will meet the requirements of article 6(1). As the court explained in para 46:

> "No specialist expertise was required to determine this issue, which is, under the new system, determined by a non-specialist tribunal. Nor, unlike the cases referred to [*Bryan* and *Runa Begum*], can the factual findings in the present case be said to be merely incidental to the reaching of broader judgments of policy or expediency which it was for the democratically accountable authority to take."

61. I read this passage as an endorsement of the point that Lord Bingham made in *Runa Begum*, para 5, that if an elastic interpretation is given to the article 6(1) concept of "civil rights" flexibility must also be given to the procedural requirements of that article if over-judicialisation of the administrative welfare schemes is to be avoided. But it is important, too, to recognise that in *Tsfayo*, as in *Runa Begum*, the question whether, and if so at what point, administrative welfare schemes fall outside the scope of article 6(1) altogether was not tested. *Tsfayo*, as I have said, fell within the mainstream of cases about social security and welfare benefits. In *Runa Begum* the House preferred not to take a decision on this issue.

62. There are, however, a number of straws in the wind that have been generated by the decisions from Strasbourg since *Runa Begum* that suggest that a distinction can now be made between the class of social security and welfare benefits that is of the kind exemplified by *Salesi v Italy* and those benefits which are, in their essence, dependent upon the exercise of judgment by the relevant authority. The phrase "civil rights" is, of course, an autonomous concept: eg *Woobron Volkshuisvestingsgroep v The Netherlands*, application no 47122/99), 18 June 2002 (unreported). But it does convey the idea of what, in *Stec v United Kingdom* (2005) 41 EHRR SE18, para 48, the Strasbourg court referred to as "an assertable right". In that paragraph, having declared that the Convention must be read as a whole and interpreted in such a way as to promote internal consistency and harmony between its various provisions, and in para 49 that it is in the interests of the Convention as a whole that the autonomous concept of "possession" in article 1 of Protocol No 1 should be interpreted in a way which is consistent with the concept of pecuniary rights in article 6(1), the court said, at para 51:

> "In the modern, democratic state, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid – subject to the fulfilment of the conditions of eligibility – as of right. Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding article 1 of Protocol No 1 to be applicable."

63. The court's references in *Loiseau v France* application no 46809/99, 18 November 2003 (unreported), para 7, to "a 'private right' which can be said, at least on arguable grounds, to be recognised under domestic law" and to "an individual right of which the applicant may consider himself the holder" are consistent with this approach. So too are the references in *Mennitto v Italy* (2002) 34 EHRR 1122, para 23, to "a 'right' which can be said, at least on arguable grounds, to be recognised under domestic law", where the court added:

> "The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise. The outcome of the proceedings *must* be directly decisive for the right in question." [emphasis added]

Cases where the award of benefit is dependent upon a series of evaluative judgments as to whether the statutory criteria are satisfied and, if so, how the need for it as assessed ought to be met do not answer to that description.

64. The exact limits of the autonomous concept remain elusive. One can be confident that cases where the relationship between the beneficiary and the public authority is of a public law character, as in *Woodbron v The Netherlands*, where the role of the applicant associations in regard to the construction and maintenance of public housing was of a typically general interest character, fall outside its scope. Mr Howell QC submitted that there is no distinction to be drawn between the forms in which welfare benefits may be provided. But none of the Strasbourg authorities go that far, and the carefully worded passages from *Loiseau v France* and *Stec v United Kingdom* to which I have referred seem to me to contradict his proposition. The series of cases about the enforcement of judgments made by the courts about social housing in Russia to which he referred, of which the latest is *Nagovitsyn v Russia* application no 6859/02, 24 January 2008 (not reported), offer no assistance as the question whether a duty to provide social housing gives rise to a "civil right" was not argued.

65. For these reasons I think that it can now be asserted with reasonable confidence that the duty of the local authority under section 20(1) of the 1989 Act to provide accommodation for any child in need within their area who appears to them to require accommodation as a result of the factors mentioned in that subsection does not give rise to a "civil right" within the meaning of article 6(1) of the Convention.

LORD SCOTT

66. I have found Lady Hale's discussion of the issues raised illuminating and her reasons for the conclusions she has expressed convincing. I cannot usefully add anything or improve upon those reasons and gratefully associate myself with them. I would, therefore, for the reasons she has given, allow these appeals and adopt the suggestion she has made in the last sentence of her opinion.

LORD WALKER

67. I am in full agreement with the judgment of Lady Hale. In his judgment Lord Hope gives powerful reasons for concluding that a local authority's duty under section 20(1) of the Children Act 1989 is not a "civil right" for the purposes of Article 6(1). But the Court does not have to decide that point in order to dispose of this appeal. The Strasbourg jurisprudence is still developing. I would prefer to leave the point open, while acknowledging the force of Lord Hope's reasoning.

LORD NEUBERGER

68. For the reasons given by Lady Hale, I too would allow this appeal.